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Office of Administrative Law Judges
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DATED: December 1, 1997
Case No.: 93-ERA-24
File No.: 93-107-08298

In the Matter of:

CALVIN J. CREEKMORE
Complainant

v.

ABB POWER SYSTEMS ENERGY
SERVICES, INC., and
OCTAGON, INC.
Respondents

APPEARANCE:

Robert W. Heagney, Esq.
For the Complainant

James M. Paulson, Esq.
John W. Susen, Esq.
For the Respondents

BEFORE: David W. Di Nardi
Administrative Law Judge

Supplemental Recommended Decision and Order on Remand
PROCEDURAL HISTORY

This Administrative Law Judge, by Recommended Decision and Order

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issued on September 1, 1994, concluded **inter alia**, that Calvin Creekmore ("Complainant" herein), had been engaged in protected activity, that the management and employees of ABB Power Systems Energy Services, Inc. ("Respondent") were aware of such protected activity and that Complainant had been subjected to adverse personnel action as a result thereof. As this Judge concluded that reinstatement was not appropriate in the factual scenario presented herein, front pay, other damages and benefits were awarded to Complainant.

The Deputy Secretary of Labor issued a Decision and Remand Order on February 14, 1996.[1] In his decision, the Deputy Secretary made a finding of liability, but modified the ALJ's recommended damages awarded. The Deputy Secretary concluded:

> "6. On remand, the ALJ shall determine the amount of back pay plus interest and the costs for Creekmore's travel, lodging, and meals to attend the hearing. The ALJ shall afford the parties the opportunity to submit evidence on the remand issues. The ALJ's recommendations on back pay and hearing related costs shall be set forth in a supplemental recommended decision and order."

See Decision and Remand Order, dated February 14, 1996, at 28. Thereafter, on April 10, 1996, the Deputy Secretary responded to a petition for reconsideration filed by Complainant and corrected certain ministerial errors in the amount of damages awarded in the initial Decision and Remand Order. The Deputy Secretary also authorized the ALJ on remand to take evidence to determine whether Complainant would have had moving expenses reimbursed by Respondent if he had moved to Florida when Respondent was sold and to award relocation expenses to which Mr. Creekmore is entitled, if any. **See** Supplemental Order Concerning Remand, dated April 10, 1996, at 4.

Additionally, on June 20, 1996, the Administrative Review Board issued a Second Supplemental Order Concerning Remand to address a petition for reconsideration filed by Respondent concerning the appropriate entity to which reinstatement, if any, should be ordered, because Respondent had been sold to Octagon, Inc. The Administrative Review Board confirmed that PSESI retained the obligation to reinstate Complainant. The Board further ordered, in case of a contractual dispute over the meaning of the indemnification language contained in the sale agreement, that "on remand, the ALJ shall give Octagon, Inc. the notice described above [notice of Combustion Engineering's position that any reinstatement obligation remains with PSESI], and an opportunity to be heard in this matter." **See** Second Supplemental Order Concerning Remand, dated June 20, 1996, at 5.

The voluminous record was docketed at the Boston District and this

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Administrative Law Judge, by ORDER issued on December 13, 1996, ordered the parties to file prehearing reports on February 12, 1997 and the reconvened hearing, to effectuate the ARB's mandate, was held on March 17 and 18, 1997 at our courtroom in New London, Connecticut, at which time the parties offered testimony and documentary evidence in support of their respective positions.

Post-hearing evidence has been admitted as follows:

Exhibit No.	**Item**	**Filing Date**
JX 1	Proposed post-hearing schedule	06/30/97
CX 87	Complainant's Certificate of Production Compliance	07/07/97
RX 56a	Attorney Paulson's letter filing a redacted version of RX 55, as well as	07/11/97
RX 56	PSESI Health Plan Documents	07/11/97
RX 57	The supplemental report of Peter M. Carroll, F.S.A.	07/11/97
RX 57A	Attorney Paulson's letter filing additional documentation to supplement RX 56	08/15/97
RX 58	Respondents' brief	09/15/97
CX 88	Complainant's brief	09/16/97
CX 78	April 26, 1996 letter and W-2s for 1994, 1995 and 1996	09/16/97

The record was closed on September 16, 1997 as no further documents were filed.

As a preliminary matter, I note that, in response to Complainant's Motion for Clarification and Award of Interest, this ALJ denied the motion, but stated that "[t]he

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issue of interest on any award may be briefed, along with all other issues, in the parties pre-hearing briefs and the Court will rule upon this issue in its Order." **See** Order on Motion for Clarification and Award of Interest, dated January 8, 1997, at 1. (ALJ EX 15)

As was readily apparent at the hearing, there is considerable dispute among the parties as to the mandate herein presented to this Judge.

The Respondents submit that these are the issues to be considered herein on remand:

1. Determination of the back pay and benefits due to Mr. Creekmore.
2. Whether Mr. Creekmore's position with PSESI would have been eliminated at the point of or after PSESI's sale to Octagon, Inc.
3. Whether reinstatement, if any, can and should be ordered, and the appropriate entity responsible for any such reinstatement.
4. Determination of the amount to which Mr. Creekmore is entitled for transportation, lodging and meals while attending the hearing.
5. Whether Mr. Creekmore sustained expenses for relocating to Virginia that were not reimbursed by his new employer and that would have been reimbursed by Respondent if he had made the move to Florida when PSESI was sold.
6. Whether interest, if any, should be paid on various aspects of the award.

Complainant submits the following issues for my consideration:

To date, the items that have been definitively awarded consistently by all three of the post Administrative Law Judge decisions are as follows:

1. Compensatory Damages	$ 40,000.00
2. Medical Expense Reimbursement	$ 1,050.00
3. Job Search Expenses	$ 2,000.00
4. Travel Expenses	$ 2,240.00
5. Attorney Fees and costs through statement of April 12, 1996	$ 90,071.52
TOTAL	$135,361.52

The Complainant submits that the following issues remain for this Administrative Law Judge to resolve in order to complete all of the issues that have been

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remanded to date:

I Whether Mr. Creekmore would be placed at medical risk if he is reinstated to PSESI or ABB-Combustion Engineering ("ABB-CE")? And, if such is the case, whether an award of future wages and pension benefits in lieu of reinstatement is appropriate?
II Whether the liability for reinstatement of Creekmore is contractually the responsibility of ABB-CE, and precisely how does that give effect to the hold harmless language of the Purchase and Sale Agreement in light of the Order of Reinstatement?
III Whether a bona fide position of employment is being offered to Mr. Creekmore by Respondents?

IV What is the back pay liability of Respondents to Creekmore, including back pay, health, pension and other related benefits?
V Whether Creekmore sustained expenses for relocating to Virginia that were not reimbursed by his employer that would have been reimbursed by Respondents if he had made the move to Florida when PSESI was sold?
VI What reimbursable costs for transportation to and from the hearings, including lodging and meals, did Creekmore incur?
VII Whether interest shall be awarded on all sums awarded but unpaid in the decisions rendered to date from the date of those decisions to the date of payment, and at what rate?
VIII What attorney's fees, costs and expenses have Mr. Creekmore and his counsel incurred since the last award of attorney's fees, costs and expenses?

I shall now consider and resolve the issues raised by the parties and in the order in which they have been raised.

Summary of the Evidence

Complainant gave additional testimony at the reconvened hearing and Respondents offered the testimony of the President of Octagon, Inc. with regard to 1) the bona fide position of employment Octagon is proposing to offer to Mr. Creekmore; or 2) Octagon's

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position vis-a-vis the hold harmless indemnification agreement and how it relates to the re-employment of Mr. Creekmore pursuant to the Orders to date.

According to the Complainant, the threshold issue should be framed as follows (Respondents, however, maintain vigorously that this issue has been foreclosed by the decisions of the Deputy Secretary of Labor and the ARB and that these decisions are the Law of the Case):

I) Whether Mr. Creekmore would be placed at medical risk if he is ordered to be reinstated to PSESI or ABB-CE? And, if such is the case, whether an award of future wages and pension benefits in lieu of reinstatement is appropriate?

Claimant submits that the following inferences may be drawn from this record:

1. Mr. Creekmore has suffered medical conditions including artery disease with a prior myocardial infarction, subsequent coronary disease and angioplasty, hypertension and abdominal pain requiring histamine antagonists and he is now being evaluated for peptic ulcer disease. (CX 70 - CX 82)

2. Dr. John P. Parker, M.D., Mr. Creekmore's cardiologist, has opined the above conditions are stress-related. (CX 82)

3. Dr. Parker has identified the major contributing factors to Mr. Creekmore's medical conditions as the stress he has undergone as a result of his termination from his employment with Respondent and resulting litigation and turmoil in his life. (CX 70-82)

4. Dr. Parker has "strongly advised" Mr. Creekmore not to accept a position with the Respondents due to his belief that such an employment would increase Mr. Creekmore's stress leading to an aggravation of his medical conditions, worsening of Mr. Creekmore's health and "quite likely a major event." (CX 70 - 82)

5. Mr. Creekmore could not reasonably accept reemployment with PSESI as he has no level of confidence of receiving fair treatment, secure employment, without animosity, lack of position opportunities and general uncertainty as to his potential treatment as a reinstated employee. (Tr. 1478-1485)

6. No offer of reinstatement has been made to Creekmore by Respondents and no open position exists within PSESI which is appropriate to Mr. Creekmore's skills and experience. (Tr. 1663-64)

7. The stock purchase agreement by which ABB-CE sold PSESI to Octagon, Inc. provides that ABB-CE pay all obligations of PSESI as a result of

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Order/Judgments entered to enforce the present claims, including to pay *all* costs of the employment of Mr. Creekmore should he be reinstated to PSESI, including wages, benefits, taxes, etc. (Tr. 1663-65, 1690-1701; RX-55)

8. The President of Octagon, Inc. believes PSESI has no position to which Mr. Creekmore could be reinstated, that reinstatement would be a very difficult circumstance for the PSESI organization, and that the only alternative would be for PSESI to terminate an existing employee to identify a position for Mr. Creekmore. (Tr. 1663-64)

9. Mr. William Amt, President of Octagon, Inc., testified he believed reinstatement would be a very difficult circumstance for Mr. Creekmore. (Tr. 1663)

10. Mr. Amt, President of Octagon, Inc., assumes some resolution other than reinstatement of Creekmore would be required. (Tr. 1663-64)

As noted above, the Deputy Secretary of Labor, in the February 14, 1996 Decision and Remand, found front pay was not appropriate as "the observed tension between the parties at the hearings is not sufficient to demonstrate the impossibility of a productive and amicable working relationship in this case." At 18. This standard for evaluating the reinstatement/front pay decision was overturned by the subsequent decision in **Michaud v. B.S.P. Transport**, 96-A.R.B. 198 (Jan. 6, 1997) which adopted a standard by which to evaluate a plaintiff's decision to refuse to accept a bona fide offer of reinstatement, **i.e.**,

such refusal is to be measured by an objective reasonable person analysis. **Michaud**, at 8; citing **City of Morris v. American Nat'l. Can Co.**, 952 F.2d 200, 203 (8th Cir. 1991); **Friedler v. Indianhead Truck Line, Inc.**, 670 F.2d 806, 808 (8th Cir. 1982). **Michaud**, like Creekmore, was warned by his doctor *not* to accept an offer of reinstatement. These decisions reflect the Supreme Court's decision in **Ford Motor Co. V. E.E.O.C.**, 458 U.S. 219, 241 (1982) that "Special circumstances" can be the basis to decline reinstatement and continue to accrue back pay, as well as front pay.

Complaint submits that the **Michaud** decision has reopened the issue of reinstatement/back pay versus back pay/front pay and points out that no reasonable man who, like Creekmore, was fired in September, 1992, worked away from his family for months in 1993 as a nuclear contract employee, who sold his Connecticut home at a loss and relocated his family to accept a position to start a new division for his new employer in Virginia, bought a new home and established a new life in Virginia, is going to accept an offer of reinstatement to an employer, which is now located in Florida, a firm which is the successor to the company which fired him after 27 years of loyal service to punish that employee for following the laws designed to ensure nuclear safety.

Complainant posits that he is being reasonable in not accepting reinstatement to an employer which presented unsubstantiated testimony that the employee was

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an intentional violator of nuclear safety laws, an employer which refuses to recognize the wrong it did to such employee despite the finding of this Administrative Law Judge, the Deputy Secretary of Labor and the Administrative Review Board that it retaliated against Creekmore. No reasonable man who is told this can be ordered reinstated to a former employer which professes to have no open positions suitable for him, an employer which relocated employees from Connecticut to Florida only to lay them off, to a position which, if it existed, would pay only between $5,000 - $7,500 per year more in salary, and which employer has not agreed to pay for relocation expenses to the employee to relocate from Virginia to Florida.

No reasonable man who, like Complainant, who is the sole support for his wife and daughter, after having been brought back from death's doorstep, brought about by a heart attack, whose doctor has warned him that the heart attack arose from stress from his illegal firing and that to take this employment would be to worsen his health and "quite likely" lead to another major heart attack, could reasonably accept such a position, nor should a law designed to be remedial be put to this effect.

Under the **Michaud's** reasonable person standard, Complainant's desire to receive front pay in lieu of reinstatement is a reasonable position.

I have considered the parties' position on the scope of the remand herein from the Deputy Secretary of Labor and the ARB and I conclude that I am constrained to accept

the Respondents' position on this issue for the basic reason that the Deputy Secretary of Labor, rejecting my R.D.O. calling for an award of front pay in lieu of reinstatement, has remanded the matter to this ALJ to "determine the amount of back pay plus interest and the costs for Creekmore's travel, lodging and meals to attend the hearing." That is my sole mandate and that constitutes the Law of the Case, and I am unable to contravene or enlarge that mandate. (I still am of the opinion that my R.D.O. was the proper way to resolve this matter and that opinion has been strengthened by the ARB's more realistic look at the issue by promulgating the reasonable person test of **Michaud**, **supra**. However, that will have to be resolved in another forum.)

Accordingly, I find and conclude that reinstatement is the only remedy available to me at this time in this Supplemental R.D.O. and that the only issue remaining is the extent of such reinstatement.

> II. Whether the liability for reinstatement of Creekmore is contractually the responsibility of ABB-CE, and precisely how does this Court give effect to and interpret the hold harmless language of the Purchase and Sale Agreement in light of the Order of Reinstatement?

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Complainant requests that I draw the following inferences:

1. Asea Brown Boveri (ABB) acquired Combustion Engineering, Inc. in 1989. PSESI, a wholly-owned subsidiary of Combustion Engineering, was sold to Octagon, Inc. in 1994. Decision and Remand Order February 14, 1996, p. 1, fn 3.

2. ABB has contractually agreed to "defend, indemnify and hold harmless" Octagon, Inc. and its successors and assigns with regard to claims filed by Calvin Creekmore out of his employment termination. (RX 55)

3. The Deputy Secretary of Labor "Ordered Respondent to Reinstate Creekmore to the same or a substantially similar position with the same pay and benefits." Supp. Order Concerning Remand, April 10, 1996 at 2.

4. PSESI took actions to prevent Creekmore from becoming the Client Manager for ABB-CE at the T.V.A. Recommended Decision and Order September 1, 1994 at 29; Supp. Order Concerning Remand, February 14, 1996 at 35.

As already noted, a Court has reasoned that because reinstatement advances the policy goals of make-whole relief and deterrence in a way which money damages cannot "it is the preferred remedy in the absence of special circumstances mitigating against it." Supp. Order Concerning Remand, April 10, 1996 at 16.

"ABB-PSESI has the obligation to offer reinstatement to Creekmore. If a separate contractual obligation exists that requires another entity to assume ABB-PSESI's

reinstatement obligation ... the proper means to resolve that dispute is through an enforcement action." Second Supplemental Order Concerning Remand, June 20. 1996 at 3.

According to the Complainant, as the Respondents have chosen to reduce and liquidate the liability involved in this action to a financial responsibility, the reinstatement, in light of all the facts before this Court, should also be reduced to a financial obligation.

Complainant points out that the Respondent's illegal conduct included taking action to cause the rescinding of the offer and authorization of ABB-CE to a Client Manager position for ABB-CE at T.V.A. Recommended Decision & Order, September 1, 1994 at 29; Supp. Order Concerning Remand, April 10, 1996 at 3, 5. For this reason, the financial obligations of reinstatement should be awarded by this Court as a front pay monetary award taking into account the greater damage to Creekmore, **i.e.** the loss of the position with PSESI and/or the loss of the position with ABB-CE as the T.V.A. Client Manager.

Where Mr. Creekmore is considered as losing pension benefits for the

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interference of PSESI with his employment opportunity with ABB-CE, the pension calculation of Mr. Goddard (CX 72) would establish his loss at $146,728 and $75,506. (CX-72, pp. 2 and 3) This loss of pension results because Creekmore did not have the opportunity to accept the promotion to the ABB-CE job as Client Manager at T.V.A. and is independent of the reinstated issue. Obviously had the PSESI pension not have been terminated, this separate analysis would not arise.

Complainant now seeks an additional award of his alleged pension benefits as a result of the lost opportunity of the Client Manager position for ABB-CE at the T.V.A. However, such award is not permitted by the mandate herein and the previous rulings which are now the Law of the Case. I would note that such an award might result in double recovery as Complainant has been employed steadily for the last several years and will more than likely continue in his present employment until his planned retirement. Thus, as any lost pension is most speculative at this time, I decline to make such an award.

III. Whether a bona fide position of employment is being offered to Mr. Creekmore by Respondent?

Complainant further requests that I draw these inferences:

1. No offer of reinstatement has been made to Creekmore by Respondent and no open position exists within PSESI which is appropriate to Mr. Creekmore's skills and experience. (Tr. 1663-64)

2. The stock purchase agreement by which ABB-CE sold PSESI to Octagon, Inc. provides that ABB-CE shall pay all obligations of PSESI as a result of Order/Judgments entered to enforce the present claims, including to pay *all* costs of the employment of Mr. Creekmore should he be reinstated to PSESI, including wages, benefits, taxes, etc. (Tr. 1663-65, 1690-1701; RX-55)

3. The President of Octagon, Inc. believes PSESI now has no position to which Complainant would be reinstated, that reinstatement would be a very difficult circumstance for the PSESI organization, and that the only alternative would be for PSESI to terminate an existing employee to identify and locate a position for Mr. Creekmore. (Tr. 1663-64)

4. Mr. Amt, President of Octagon, Inc., testified he believed reinstatement would be a very difficult circumstance for Mr. Creekmore. (Tr. 1663)

5. Mr. Amt assumes some resolution other than reinstatement of Creekmore would be required. (Tr. 1663-64)

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6. Mr. Amt testified at the time that Octagon purchased PSESI, Mr. Creekmore was qualified to perform the activities as a Nuclear Assurance Security Department Inspector and hold the position that Mr. Pat Taylor holds. (Tr. 1652-54)

7. Mr. Taylor's position was necessary and was restructured to best use his skills, but an outside paid consultant had to be hired and paid to do the portion of Mr. Taylor's job which involved QA/QC responsibilities. (Tr. 1668-1670)

8. Mr. Amt knew that Complainant could perform that QA/QC function of Mr. Taylor's position without the outside consultant. (Tr. 1668-1669)

9. Octagon, Inc. downloaded some security work to PSESI and to Mr. Taylor as he could not and was not asked to handle the QA/QC function. (Tr. 1630, 1668-1669)

10. PSESI could employ Mr. Creekmore as a staff augmentation specialist. (Tr. 1670)

As noted, the prior appellate decisions reflect the following:

> "I ordered Respondent to Reinstate Creekmore to the same or a substantially similar position with the same pay and benefits." Decision and Remand Order, February 14, 1996 at 27; Supp. Order and Remand Order, April 10, 1996 at 2.

Complainant posits that no bona fide offer of reemployment has been made by PSESI to Complainant. Rather, the Respondents have attempted to create a hypothetical world of what may have happened if Mr. Creekmore had been hired as Security Manager rather than being terminated in 1992. Such hypothetical setting is speculative at best and simply

serves the self interest of the Respondents. Mr. Amt's testimony is clear that Creekmore's skills were appropriate for the Security Manager's job which the record of this case establishes as very demanding. Mr. Newholm held this position after working in QA/QC under Mr. Creekmore's supervision. Mr. Taylor was incapable of handling the QA/QC part of this job and these duties were shifted to an outside consultant. This work could have been done by Mr. Creekmore. The Respondents' argument that the Security Manager position changed is not reflective of a willingness to treat Mr. Creekmore as Mr. Taylor was treated and cover any alleged deficiencies in his background with a paid outside consultant. Mr. Amt and PSESI recognize that reinstatement would not only be difficult for PSESI, but also for Creekmore. As the indemnity and hold harmless contract between Octagon, Inc. and ABB-CE has reduced and liquidated liability for reinstatement in this action, front pay in lieu of reinstatement should be awarded.

According to the Respondents, a central factual question is the appropriate level of damages to be awarded to Mr. Creekmore, taking into account the sale and relocation of PSESI to Florida and the effective elimination of PSESI's quality assurance/quality control

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("QA/QC") business. Mr. Creekmore's function with PSESI was to head its QA/AC line of business, primarily the sales and solicitation effort.[2] The testimony and exhibits demonstrated that any damages incurred by Mr. Creekmore are limited because: (1) there was insufficient QA/QC work to justify a full-time QA/QC position, (2) PSESI did not solicit any QA/QC work, (3) PSESI virtually completed all existing QA/QC contracts, (4) the individual responsible for PSESI's remaining QA/QC activities was laid of in March 1995, (5) there was no substantially similar position for which Mr. Creekmore was qualified and (6) after the sale, PSESI reduced the benefits provided to employees. The Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851, and the prior decisions of the Secretary of Labor and the courts mandate that damages awarded to a complainant reflect the realities of these changes within PSESI.

The statute requires that -- when a violation of the ERA's employee protection provisions is found to have occurred -- the Secretary of Labor may order (1) a party to abate a violation of the Act, (2) reinstatement (with back pay), (3) compensatory damages, and (4) costs and expenses reasonably incurred (including attorneys' and expert fees). **See** 42 U.S.C. § 5851(b)(2)(B). However, the liability faced by an employer is confined by the notion that an employee should only be placed in a position he would be in but for the adverse employment action taken against him -- **i.e.**, an aggrieved employee is made whole but is not entitled to a windfall or to otherwise be placed in a position better than other employees. This fundamental maxim is found throughout the decisions of the Secretary and the courts, according to Respondents.

In **Blackburn v. Martin**, 982 F. 2d 125 (4th Cir. 1992), the Fourth Circuit Court of Appeals upheld the decision of the Secretary in relevant part and held that a Complainant

should "only [] recover damages for the period of time he would have worked but for wrongful termination; he should not recover damage for the time after which his employment would have ended for a non-discriminatory reason." **Id.** at 129. Indeed, it has consistently been the Secretary's position that responsibility for back pay and damages ceases when the employee's employment and/or benefits would have otherwise ended. "The Secretary has adopted for ERA cases the long accepted rule of remedies in labor law that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the found.'" **Blackburn v. Metric Constructor's, Inc.**, Case No. 86-ERA-4, Sec. Dec. (Dec. and Ord. on Atty.'s Fees and Damages), Oct. 30, 1991, slip op. at 3 (citing **Francis v. Bogan**, Case 86-ERA-8, Sec. Fin. Dec., Apr. 1, 1988, slip op. at 6. **See also Artrip v. Ebasco Services, Inc.**, Case No. 89-ERA-23, Dec. and Ord., Sept. 27, 1996, slip op. at 3-4; **Nichols v. Bechtel Construction, Inc.**, Case No. 86-ERA-4, Sec. Fin. Dec., Nov. 18, 1993, slip op. 4-5, **aff'd Bechtel Construction Co. v. Sec. of Labor**, 50 F.3d 426 (11th Cir. 1995); **Van Beck v. Daniel Construction Co.**, Case No. 86-ERA-26, Dec. and Remand Ord., Aug. 3, 1993, slip op. at 5-6.

Hence, when assessing the appropriate damages that a successful complainant may recover, the focus must remain on the status of the complainant's old position and similarly situated employees who remained after the complainant was terminated. As stated by the Secretary in **Blake v. Hatfield Electric Co.**, Case No. 87-ERA-4, Dec. and Remand Ord., 1992, "Complainant is entitled only to the same treatment as other inspectors who were retained after [the date of Complainant's lay off]." Similarly, in **Artrip v. Ebasco Services, Inc.**, the Administrative Review Board recently again focused the damages question on the status of other employees similarly situated to the complainant and warned that liability for back pay and future employment does not extend where the possibility for future employment is "merely speculative." **Artrip**, slip op. at 4 (citing **Holley v. Northrop Worldwide Aircraft Services**, 835 F.2d 1375, 1377 (11th Cir. 1988)).

In the current matter, according to the Respondents, the undisputed testimony and evidence at the hearing did not leave any room for such speculation -- Mr. Creekmore's former position was eliminated and all of his functions ceased. There is no substantially similar position for which the Complainant is qualified. The current President of PSESI, William Amt, testified that PSESI completed its withdrawal from the QA/QC business, such withdrawal that had begun before the sale, and that PSESI does not intend to pursue this work in the future. (Tr. 1619) Mr. Amt further testified that when PSESI moved to Florida, it did not pursue any further QA/QC work. (Tr. 1621)

Finally, Mr. Amt testified that the individuals who performed the phase-out of the QA/QC work are no longer with PSESI. (Tr. 1624. 1628) In the Deputy Secretary's Decision and Remand Order in this matter, he found that two managers "took over Creekmore's QA/QC work" -- William Chalfant and Roy Newholm. Dec. and Remand

Order, slip op. at 20. Additionally, in making his finding of liability in this matter, the Deputy Secretary also found that PSESI should have retained Mr. Creekmore instead of Mr. Newholm when it restructured. *Id.* at 13. Mr. Amt stated that Mr. Newholm left PSESI in January 1995, at the time his functions were eliminated.[3] (Tr. 1628)

The testimony further established that Mr. Chalfant was terminated in a reduction in force in March 1995 and that virtually all the QA/QC functions he had performed (which at the time had made up a small portion of his job duties) had been virtually completed. (Tr. 1624) Even if he had been retained, Mr. Creekmore would have been terminated on March 24, 1995 when Mr. Chalfant was discharged. Finally, Mr. Amt testified that PSESI does not currently have any open or filled positions which require the experience or skill sets outlined in Mr. Creekmore's resume. (Tr. 1652-1655)[4]

Mr. Amt's testimony left no room for speculation -- PSESI completed the

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phase-out and has virtually ceased to perform all QA/QC work, and Mr. Creekmore would have been terminated, at the latest, by March 1995. Although Respondents continue to maintain that Mr. Creekmore was laid off in September 1992 for legitimate, nondiscriminatory reasons and further that Mr. Creekmore would have been laid off when PSESI was sold in April 1994, the testimony conclusively demonstrated that, at the least, Mr. Creekmore would not have had any position with PSESI after March 1995. Hence, the ALJ cannot order reinstatement and, at most, can only award Mr. Creekmore back pay through March 1995, the last possible date he could have been employed by PSESI.[5]

The Deputy Secretary specifically asked for the position of Octagon as to reinstatement. Octagon's position is the same as that of the Respondent. Reinstatement is not appropriate because Mr. Creekmore, had he not been laid off initially, would have been laid off, as described herein, on at least two occasions before the present time. Additionally, there is no present position at PSESI that he is qualified to fill, according to Respondent.

As noted, Respondents argue that even if Complainant had been retained as an employee after September of 1992, he, nevertheless, would have been terminated in March 24, 1995 reduction in force, at which time even Mr. Chalfant was terminated.

Discussion

A general remedial principle of employment discrimination law is that "the goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d. 125, 129 (4th Cir. 1992); **see also Albemarle Paper Co. v. Moody**, 422 U.S. 405, 420-21 (1975); **Clarke v. Frank**, 960 F.2d 1146, 1151 (2d Cir. 1991); **Hamilton v. Sharp Air Freight Service, Inc.**, 91-STA-49 (Sec'y July 24, 1992);

Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). The **Blackburn** decision provides, "The Secretary has adopted for ERA cases the long accepted rule of remedies in labor law that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." **Blackburn v. Metric Constructor's Inc.**, 86-ERA-4 (Sec'y Oct. 30, 1991) (citing **Francis v. Bogan**, 86-ERA-8 (Sec'y Apr. 1, 1988)).

Under this rationale, individuals who are wrongly discriminated against should only recover damages for the period of time that they "would have worked but for wrongful termination," and they "should not recover damages for the time after which [their] employment would have ended for a nondiscriminatory reason." **Blackburn**, 982 F.2d at 129 (citations omitted); **see also Artrip v. Ebasco Services, Inc.**, 89-ERA-23 (ARB Sept. 27, 1996) ("Back pay awards are based on what the complainant would have earned had he not been subjected to unlawful

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retaliation. . . . The period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found"). For example, "if a position were abolished for financial reasons, the employee would not be able to recover after the position was eliminated." **Blackburn**, 982 F.2d at 129 (citations omitted). This court, in its assessment of damages, should focus on both the status of the complainant's old position, and the status of similarly situated employee's who remained working after complainant's termination. This is because the complainant is "entitled only to the same treatment as other [similarly situated employees] who were retained after [complainant's termination]." **Blake v. Hatfield Electric Co.**, 87-ERA-4 (Sec'y Jan. 22, 1992).

The United States Court of Appeals for the Second Circuit, under whose jurisdiction this case arises, has affirmed the limiting of an employee's pay to seven weeks, where the complainant's job was schedules to be eliminated seven weeks after a jury verdict. **Reed v. A.W. Lawrence & Co., Inc.**, 95 F.3d 1170, 1182 (2d Cir. 1996); **see also Bechtel Construction Co. v. Secretary of Labor**, 50 F.3d 926 (11th Cir. 1995) (affirming administrative law judge's determination that complainant was not entitled to reinstatement and was only entitled to an award of back wages for a month because complainant's entire crew was laid off within thirty days of his termination).

An employer's selling off of a division, however, in and of itself, will not automatically terminate its liability. In such situations, a court must analyze whether similarly situated employees were provided an opportunity to transfer jobs. In **Gaddy v. Abex Corporation**, 884 F.2d 312, 319 (7th Cir. 1989), the United States Court of Appeals for the Seventh Circuit held that an employer's back pay liability for wrongful termination is not severed when the employer sold the plant where the plaintiff worked. This was due to evidence revealing that employees in plaintiff's former department continued to be employed in the same position by the new plant owner after the sale.

Similarly, **Nolan v. AC Express**, 82-STA-37 (Sec'y Jan. 17, 1995) involved a situation where a complainant was wrongfully terminated and, shortly after her hearing, the employer closed its Buffalo location where complainant worked. The Secretary remanded the case for a determination of what benefits should be awarded in light of the new evidence. The Secretary held that if the Buffalo employees had a right to transfer to other terminals, it would be appropriate to order the employer to offer reinstatement to a substantially similar position at another location. In such a case, back pay would continue to accrue until reinstatement or declination of reinstatement. The Secretary went on to state that if the Buffalo employees had no transfer rights, and they were laid off when the operation closed, then it would be appropriate to end back pay as of the date of closing.

Finally, in **Holley v. Northrop Worldwide Aircraft Serv., Inc.**, 835 F.2d 1375 (11th Cir. 1988) a complainant was wrongfully terminated from working on a government contracted job. The court noted that complainant was not entitled to the remedy of

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reinstatement because each of the complainant's co-workers were fired upon the initial termination of government contracts, and only 59% of those workers were rehired by the former employer over one and one-half years later under a new government contract.

Accordingly, in view of the foregoing, I find and conclude that Respondents' liability for back pay and reinstatement purposes, terminated in March of 1995. I find that Complainant would be eligible for reinstatement so long as Respondents' employees were working with Octagon. However, once the entire division was terminated, Respondents' obligation to Complainant also ceased. This finding prevents Complainant from being put in a better position than he would have been had he not be discriminated against.

As noted above, in footnote 2, the Deputy Secretary has held, as a matter of law, that PSESI's decision to withdraw from the QA/QC business and to lay off staff was a legitimate business decision. Thus, as PSESI and Octagon, Inc. had completely withdrawn from the QA/QC business in March of 1995 Complainant's award of back pay will terminate in March of 1995, the same day on which Mr. Chalfant was terminated.

I shall now discuss and resolve the amount of such back pay.

> IV. What is the back pay liability of Respondents to Creekmore, including back pay, health, pension and other related benefits?

Complainant seeks the following award on this issue:

Back Wages

1. Mr. Creekmore's salary in 1992 was $66,040.00. (Tr. 272; RX 49)

2. Mr. Creekmore's average annual salary increase in his 27 years of employment with ABB-CE and ABB-PSESI was more than 104%. (Tr. 272; RX 49)

3. Mr. Creekmore's 1993 assumed PSESI salary is $66,040 times 104%, or $69,056.[6] (Facts I and 2; RX-49)

NOTE: For format change, Mr. Creekmore ''s 1993 assumed PSESI salary is (69,056 ($66,040 X 4%)

4. Mr. Creekmore's 1994 assumed PSESI salary is $69,056 times 104%, or $71,818.

5. Mr. Creekmore would have received a June 1, 1994 10% merit increase on transfer to Florida, bringing his salary to $79,999 (RX-50; Tr. 1584).

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5A. Mr. Creekmore's total salary for 1994 would have been one-half $71,818 = $35,909 plus one-half $78,999 = $39,499 totaling $75,408.50

6. Mr. Creekmore's 1995 assumed PSESI salary is $78,999 times 104%, or $82,159.

7. Mr. Creekmore's 1996 assumed PSESI salary is $82,159 times 104%, or $85,445.

8. Mr. Creekmore's 1997 assumed PSESI salary would be $85,445 times 104%, or $88,862.

9. Mr. Creekmore's actual earnings for 1992 are:

A) PSESI (salary & severance)	$66,040.00[7]	(RX-49)
B) National Inspection	$ 2,430.00	(CX-77)
	$68,470.00	

10. Mr. Creekmore's actual earnings for 1993 are:

A) Severance-PSESI(CX-10)	- $27,781.25[8]	(CX-10)
B) National Insp.(Tr. 1411, W-2)	- $15,885.00	(CX-77)
C) Atlantic Group	- $49,797.24	(CX-78)

11. Mr. Creekmore's actual earnings for 1994 are:

A) Gross Atlantic Group w/auto allowance $67,190.004[9] (CX-78)
B) Atlantic Group minus auto expense $63,019.00

12. Mr. Creekmore's actual earnings for 1995 are:

A) Atlantic Group $68,616.00
Atlantic Group minus auto expense of $3,653[10]
$64,963.00

13. Mr. Creekmore's actual earnings for 1996 are:

A) Atlantic Group $73,942.00
Atlantic Group minus actual auto expense of $3,322.00 $70,620.00 (CX-78)

14. Mr. Creekmore's actual and assumed earnings for 1997 are:

[Page 18]
A) Atlantic Group weekly = ,337.00
X 52 = $69,524 + auto allowed of $5,400 - Total = $74,924.00.
Average 1994-96 auto allowance = $3,715.33 (CX-79)
Atlantic Group minus average auto Expense $71,208.00 (CX-78)

15. Mr. Creekmore was required to incur expenses to accept the position in Virginia to sell his Connecticut house and to buy his Virginia home ,the sum of $27,178.00 (Tr. 1419-1426; CX-80).

16. Mr. Creekmore's Lost Wages through December 31, 1997 are as follows:

1992 -($ 2,430.00)
1993 - $ 5,817.00
1994 - $ 5,663.00
1995 - $10,449.00
1996 - $11,539.00
1997 - $ 7,654.00 Total = $38,692.00

A	B	C	D	E	F	G
				Total Atlantic Group Wage-Actual Auto Exp.	Expenses Incurred to obtain position	Annual Loss B-(C+D+E-F) =G
	A.B.B. Comp	A.B.B. COMP. & Severance	Interim Earning Nat'l Insp.			

Year	4%/Yr.	Paid			
1992	66,040	66,040	2,430.00	--	27,178.04 (2,430)
1993	68,862	24,361.00	15,885.00	49,797.00	5,817
1994	75,408	--	--	63,019.00	5,663
1995	82,159	--	--	64,963.00	10,449
1996	85,445	--	--	70,620.00	11,539
1997	78,862	--	--	71,208.00**	7,654
				TOTAL	38,692.00

**,337.00 per week + $5,400.00 minus average auto of $3,715.00

A = Year - January I through December 31
B = 4% Annual Increase over 1992 Base of $66,040.00 (RX-49)
C = Severance (CX-10) September 28, 1992 to May 28, 1993
attributed weekly

[Page 19]
D = CX-78
E = CX-78, with W-2s

17. Interest for 1992 through 1997 at the I.R.S. rate set forth in a later portion of this brief with a schedule to apply factors to be awarded interest.

18. PSESI employees were reimbursed for their relocation to Florida. Mr. Chalfant's plan was as follows:

A) Up to three house hunting trips with spouse, including hotel and meals.
B) Moving van for personal furniture and household goods.

D) State registration fees up to $800.00.
E) Closing costs on home - 6% of sale price.
F) Relocation Trip.
G) 10% raise in salary.[11] (Tr. 1584-88)

19. The PSESI relocation program would have paid Creekmore at least the following:

A)	Housing and Travel during move	$ 6,353.00
B)	Moving Expenses	$ 6,439.00
C)	Two weeks pay, $75,408/52 =	$ 2,900.00
D)	Registration or other state fees	$ 800.00
E)	Real Estate fee (6%) on house	$ 6,525.00
F)	Relocation Trip	$
G)	10% Raise	$ 7,181.00
	TOTAL	$30,198.00

Respondents, vigorously protesting that Complainant is entitled to the award of damages he seeks, submit that he is entitled only to these damages:

The following are calculations of the back pay damages, less severance pay offset and mitigation, which may be due to Mr. Creekmore under the current status of the case. As set forth above, Respondents contend that Mr. Creekmore would have been laid off in April 1994, when PSESI was sold. Hence, Mr. Creekmore's back pay would cease in April 1994 (and Mr. Creekmore would be entitled to $4,200.00 in back pay). This amount is more than offset by Mr. Creekmore's interim earnings, as reflected herein.

Alternatively, the following calculations reflect potential amounts of back pay and other benefits to which Mr. Creekmore would be entitled through March 24, 1995, when Mr. Chalfant was terminated and after which PSESI effectively completed exiting the business and ceased QA/QC functions. **See generally Van Beck v. Daniel Construction Co.**, Case No. 86-ERA-26, Dec. and Remand Ord., Aug. 3, 1993, slip op. at 6 (back pay

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ends when job definitively eliminated).

A. Back Wages	***Amount***
Maximum Back Wages	
Sept 1992 (lay off date) until May 1993	-0-
[During this period, Mr. Creekmore received full severance from PSESI and therefore is not entitled to any back wages award]	
June 1993 until April 1994 (PSESI sale date)	$ 4,200.00
[During this period, Mr. Creekmore's PSESI salary would have been $66,040 annually, while his salary with the Atlantic Group during this period was $61,000.00 annually. The difference between these two salaries for this period is $5,040.00 annually, or $420.00 per month (i.e. $5040.00 divided by 12 equals $420.00). Therefore, for	

this 10 month period, the lost wages equal $4,200.00 ($420 x 10).]

May 1994 until March 1995 (date of Mr. Chalfant's termination) $10,123.30

[Effective June 1994, PSESI employees who relocated to Florida received a 10% merit increase in their salary. His salary from June 1994 until the last possible date of employment in March 1995 would therefore have been $72,644.00 annually (10% greater than $66,040.00), or $6053.66 per month ($72,644.00 divided by 12 months).

Assuming that Mr. Creekmore would have received this increase and assuming that the salary he actually received at the Atlantic Group remained constant, he would therefore have an annual difference in salary for the period after June 1994 of $11,644.00, or have lost at a maximum $970.33 per month ($11,644.00 divided by 12) for the months between June 1994 and March 1995. Therefore, the amount of lost wages would be $9,703.30 ($970.33 x 10 months). Mr. Creekmore would also be entitled to $420.00 for the month of May 1994, before any salary increase took effect at PSESI. This makes the maximum

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total lost wages for this period $10,123.30 ($9,703.30 plus $420.00)]

Subtotal Back Wages Owed ***$14,323.30***

Mitigation Amount

Total Offset for Mitigated Interim Earnings **<$32,978>**

[This amount is comprised of wages earned by Mr. Creekmore from National Inspection between September 1992 and February 1993 (totaling $18,315.00) and wages earned at Atlantic Group between March 1993 and May 1993, when Mr. Creekmore was earning PSESI severance as well (totaling $14,663)]

TOTAL OF BACK WAGES, LESS MITIGATION OFFSET

Hence, because of the severance already paid to Mr. Creekmore and the mitigation off-sets, Mr. Creekmore is not entitled to any damages for lost wages, and Respondents have a credit of $18,654.70 against damages for lost vacation and lost pension benefits.

B. Lost Vacation ***Amount***

Sept. 1992 until March 1993 (date Atlantic Group employment began) $ 2,538.00

[During this period, Mr. Creekmore is entitled to the salary value of the vacation he lost. He was entitled to 4 weeks vacation when he was laid off. Mr. Creekmore's annual salary was $66,040.00, or ,270 per week. Hence, the value of his four weeks vacation for the entire year was $5,080.00 (,270.00 x. 4). The monthly value of Mr. Creekmore's vacation is then $423.00 per month ($5,080 divided by 12 months). The value of these 6 months of lost vacation is therefore $2,538.00 ($423/month x 6 months)].

Apr. 1993 until May 1994 (date of salary increase) $ 2,954.00

[During this period, Mr. Creekmore lost only two weeks of vacation per year because he began to receive 2 weeks of vacation from the Atlantic Group, his new employer. As noted above, Mr. Creekmore's PSESI salary at the

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time of his lay off was ,270 per week, making the annual value of the two weeks lost vacation for this period equal $2,540.00, or $211.00 per month ($2,540.00 divided by 12). Therefore, for these 14 months, the value of the lost vacation is $2,954.00]

June 1994 until Mar. 1995 (date of final termination) $ 2,328.33

[As noted previously, Mr. Creekmore would have received a 10% salary increase after the PSESI move to Florida, and his annual salary beginning in June 1994 would have become $72,644.00, or ,397.00 per week ($72,644.00 divided by 52 weeks). Hence, the value of his two weeks vacation for the entire year would be $2,794.00 (,397.00 x. 2). The monthly value of Mr. Creekmore's vacation during this period is therefore $232.83 per month ($2,794.00 divided by 12 months). The value of lost vacation for this 10 month period is therefore $2,328.33 ($232.83/month x 10 months)].

Subtotal of Lost Vacation	$ 7,820.33
Less carried over salary offset (above)	<18,654.70>
TOTAL OF LOST VACATION, LESS MITIGATION OFFSET	<10,834.37>

C. Lost PSESI Pension

Mr. Amt testified, and documentary evidence demonstrated, that PSESI ceased to have any pension when it was sold in April 1994.[12] Accordingly, Mr. Creekmore is entitled to receive only lost pension credits for the period from September 1992, when he was laid off, until April 1994, according to Respondents' thesis.

In the report (RX 49) of Peter M. Carroll, who is employed by Watson Wyatt & Co., which maintains and advises on the pre-sale PSESI pension plan, Mr. Carroll calculated the precise value of the pension plan to Mr. Creekmore had he remained with PSESI through the date of Mr. Newholm's and Mr. Chalfant's respective terminations. Mr. Carroll's February 7, 1997 report is admitted into evidence as Complainant had the opportunity to cross-examine Mr. Carroll as to his actuarial conclusions. Mr. Carroll testified regarding his

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determinations as well. (Tr. 1529-1533).[13]

Carroll Report Pension Value[14]	$19,354.19
Less carried over salary offset (above)	<$10,834.37>
TOTAL OF LOST PENSION, LESS MITIGATION OFFSET	$ 8,519.82

IV. OTHER DAMAGES

A. Relocation Costs

The Deputy Secretary also remanded this matter to determine whether Mr. Creekmore would have had moving expenses reimbursed by Respondent if he had moved to Florida when Respondent was sold and to award relocation expenses to which Mr. Creekmore is entitled, if any. **See** Supplemental Order Concerning Remand, dated April 10, 1996, at 4. The PSESI relocation policy issued in June 1994 outlines that PSESI managers were entitled to (1) one hunting trip for two people for three days; (2) moving household goods to the new location; (3) allowance for two weeks gross pay for miscellaneous expenses; and (4) the cost to register two automobiles in Florida. (RX 50) At the hearing Mr.

Creekmore submitted an exhibit listing every expense he incurred in relocating to Virginia. (CX 80) On cross-examination he acknowledged that CX 80 did not take into consideration what relocation expenses he would have received had he stayed with PSESI. Accordingly, only item 7 (listed as moving expense) on CX 80 are expenses that he incurred for which he is entitled to be awarded as damages. Mr. Creekmore submitted no evidence as to what expenses he incurred on other items for which he would have received reimbursement under the PSESI policy. As Mr. Creekmore has the burden of proving his damages, he is entitled to only the moving expense he listed, according to Respondents.

B. Health Insurance and Medical Expenses.

Mr. Creekmore testified that he currently belongs to the Tri-Gon Blue Cross/Blue Shield program and that his monthly premium co-pay is $75 per month. (Tr. 1491). On the other hand, RX 56 shows that had Mr. Creekmore not been laid off from PSESI, his employee co-payment would have been either $205.00 per month or $188.00 per month, depending on which health plan he chose. In any event, the cost of his health insurance is clearly less at the Atlantic Group than if he had stayed with PSESI. Accordingly, he has no damages in this regard.

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Mr. Creekmore submitted a list of all unreimbursed medical expenses related to his heart condition as CX 81. This exhibit makes no effort to determine whether or not he would have been reimbursed for these expenses if he had not been laid off. (Tr. 1485). As he is only entitled to be made whole, he has not satisfied his burden of proving his damages on this matter.[15]

I agree with the Respondents that Claimant has not established any damages with reference to his monthly health insurance premiums as his monthly premium copay with the Atlantic Group (his current employer) is $75.00, whereas had he remained with PSESI, his employee co-payment would be either $188.00 or $205.00 per month.

Moreover, Complainant's list of all unreimbursed medical expenses does not indicate which of those expenses would have been reimbursed by PSESI, had he not been illegally terminated. Furthermore, the Deputy Secretary has held, as a matter of law, that Complainant's heart attack, and subsequent treatment, is not work-related, and that holding is the Law of the Case.

C. Travel/Hearing Expenses.

At the hearing Mr. Creekmore submitted a listing of his travel and other expenses to attend the hearing and present witnesses. (CX 84) In this regard, Mr. Creekmore testified that for the 16 days of time spent on the proceedings related to this case "unfortunately [he] didn't keep every -- every expense, every receipt for each meal." (Tr. 1452)

Accordingly, he estimated those costs at $60 per day "in lieu of all those receipts" based on an unidentified "government accepted per diem". (Tr. 1452, 1493-1495). Such a method of proving damages is not sufficiently accurate to be permitted. This is especially so where the Respondents have no way of challenging the accuracy of his claim. Certainly, business people such as Mr. Creekmore have to routinely keep such records for tax purposes. At least the same standard ought to apply in this proceeding, according to Respondents.

Complainant vigorously contends that he is entitled to an award of the full benefits that he seeks primarily on the basis of the ARB's very significant decision in **Michaud**, **supra**, and its progeny.

I agree with the Complainant and, thus, I concluded, in my **Recommended Decision and Order** of September 19, 1994, that restatement is not appropriate in this case and I awarded future wages and pension benefits to Complainant based upon the conclusion that reinstatement is not a viable option in this matter. The Deputy Secretary of Labor, however, ordered that the Court recommend reinstatement of Creekmore with PSESI. Thereafter, the ARB ruled in **Michaud v. BSP Transport**, at 96 ARB 198, 95 STA 29 (1997) that a reasonable person standard applies when weighing reinstatement

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versus front pay. Where, as in the present matter, the diagnosed medical condition leads a Complainant to indicate he does not believe reinstatement is an appropriate remedy, that Complainant may still receive front pay if his desire to avoid reinstatement is something an objective, reasonable man would decline. **Michaud**, at 7-8.[16]

Complainant submits that he is being a very objective, reasonable man when he anticipates declining an offer of reinstatement as he places his health and well being in the hands of Dr. Parker, his cardiologist, who has advised against such action. Further, PSESI has no open job for Mr. Creekmore and believes reinstatement is not the proper outcome of this matter. As the ARB and the Deputy Secretary have ordered reinstatement, but the objective standard of **Michaud** directs this Court to order front pay, thus front pay should be awarded. As the present pay differential is $7,654.00 (**See** above schedule), the Respondents should be ordered to pay $76,540.00 for the years 1998 through 2007, when Mr. Creekmore turns 65. As future pay increases are 4%, it is not necessary to reduce future years to present value at 4% per year. (CX 72)

With regard to future pension, this Court must determine if the PSESI pension plan ended in *April* 1994 upon the sale of PSESI to Octagon, Inc. Where Mr. Creekmore looks to PSESI employment as a base against which pension loss is weighed, his pension plan ends April, 1994 and would be carried forward at interest of 8% only from that date to present. Complainant's disagreements with the Carroll report, RX 59, are found in the record in that Mr. Carroll assumed an investment return through risky bonds of 8.0%. (RX 59; Tr. 1529-35) In fact, due to Mr. Creekmore's panic, he used part of his

retirement, $25,000 of $102,044, to pay debts and then incurred a tax penalty of $8,800 from said funds for early withdrawal. (Tr. 263-264) Thus, Mr. Creekmore had no more than $75,000 to invest. Mr. Carroll has ignored this fact and attributed $102,044 as gaining interest 25%, an excessively high rate. (RX-49; Tr. 1529-35) Mr. Carroll's assumed interest of $20,073.03 should be reduced by 25% to $15,000.00. (CX-59; Tr. 263-64) Further, Mr. Carroll's interest rate for Mr. Creekmore of 8% assumes he should risk principal to meet the Respondents' outcome while his funds in the ABB-CE account would be insured and have returned 8%. These are not equal analyses. Mr. Carroll also selected a 6.25% rate to calculate the PERB which is presently lower, which should increase Mr. Creekmore's payout. (Tr. 1553-54). Mr. Carroll, in fact, did not calculate the PERB but had others do this task and was thus unable to estimate the impact of

change on the PERB by a lower rate but to say the payment would jump.

Based upon the above analyses, Mr. Carroll's report (RX-49 at p.3) should be amended to show the above changes (see attached) which results in a pension payout to Mr. Creekmore of $35,588.00, according to Complainant.

On this issue, I accept and give greater weight to Mr. Carroll, the Respondents' actuarial expert. As noted above, the report of Mr. Goddard was provisionally identified as an exhibit at the hearing subject to giving Respondents' counsel the opportunity to cross-examine Mr. Goddard on his opinions and the actuarial principles he utilizes to arrive at his estimate of the value of Complainant's lost pension rights between September of 1992 and April of 1994.

Accordingly, as Mr. Carroll's report is more probative and persuasive, I find and conclude that Complainant's lost pension rights total $19,354.19 (RX 49) and that such award is reasonable, necessary and appropriate herein.

V. Whether Creekmore sustained expenses for relocating to Virginia that were not reimbursed by his employer that would have been reimbursed by Respondent if he had made the move to Florida when PSESI was sold?

Complainant submits that the record establishes the following inferences:

18. PSESI employees were reimbursed for their relocation to Florida as follows:

A) Up to three house hunting trips with spouse, including hotels and meals.
B) Moving van for personal furniture and household goods.
C) Two weeks pay for incidental expenses.
D) State registration fees up to $800.00.
E) Closing costs on home - 6% of sale price.
F) Relocation Trip.
G) 10% raise in salary.[17] (Tr. 1584-88)

19. The PSESI relocation program would have paid Creekmore at least the following:

A)	Housing and Travel during move	$ 6,353.00
B)	Moving Expenses	$ 6,439.00
C)	Two weeks pay, $75,408/52	$ 2,900.00
D)	Registration or other state fees	$ 800.00
E)	Real Estate fee (6%) on house	$ 6,525.00

F)	Relocation Trip		$
G)	10% raise		$ 7,181.00
		TOTAL	$30,198.00 (CX 80)

As noted, my mandate includes the following:

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> "On remand, the ALJ may take evidence concerning whether Creekmore sustained expenses for relocating to Virginia that were not reimbursed by his new employer and that would have been reimbursed by Respondent if he had made the move to Florida when PSESI was sold." The ALJ shall recommend the amount of relocation expenses to which Creekmore is entitled, if any." (**Supp. Order Concerning Remand**, April 10, 1996 at 4).

A complainant in an employment discrimination action is not required to seek or accept employment, even of a similar nature to that lost position, when such employment is located a distance from his home. **Smith v. Concordia Parish School Board**, 378 F.Supp. 887 (W.D.La. 1975).

Moving expenses incurred to obtain employment and thus mitigate the Respondents' obligation for back wages should properly be deducted from the mitigating wages as these were reasonable and necessary to begin the mitigating employment. **Graffices v. Control Data**, 5' F.E.P. Cases 355 (Minn. Ct. App. 1989); **McKnight v. General Motors Corp.**, 49 F.E.P. Cases 10 (D.C.E.Wis. 1989); **McDowell v. Mississippi Power and Light**, 44 F.E.P. Cases 1088 (D.C. Miss. 1986); **Thomas v. Cooper Industries, Inc.**, 39 F.E.P. Cases 1826 (D.C.N.C. 1986).

Complainant further submits that he should receive the award of his reasonable relocating expenses as said expenses were incurred solely to mitigate the losses he had incurred as a result of his illegal termination by the Respondent. Mr. Creekmore had no duty to relocate to Virginia from Connecticut to mitigate his damages. The fact that PSESI employees were relocated to Florida at a later date does not alter this analysis, according to Complainant.

Accordingly, as Complainant was not reimbursed by his current employer for his move to Virginia and as I have already concluded that Complainant is entitled to the same relocation program offered to Mr. Chalfant, I find and conclude that Complainant is entitled to the award of $30,198.00 as reimbursement of relocation expenses as such reimbursement would have been received by Complainant if he had made the move to Florida when PSESI was sold.

On this issue, I find and conclude that Complainant is entitled to the same relocation plan offered to Mr. Chalfant and this plan is delineated at items #18 and #19 above.

Accordingly, as Complainant would have received the amount of $30,198.00, the totals of Items #18 and 19, **but for his illegal and discriminatory termination**, I find and conclude that Complainant is entitled to that amount. Complainant

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has utilized a most reasonable method to identify these relocation expenses and I simply cannot accept Respondents' thesis that Complainant is entitled only to the moving expenses he has identified as item 7 (listed at moving expenses). Complainant must be treated the same as other similarly-situated employees and while PSESI had a relocation program in writing, each specific relocation was the subject of specific negotiation and, as Mr. Chalfant was able to work out a most favorable relocation plan, Complainant, as a dedicated and conscientious employee with PSESI for twenty-seven (27) years, is also entitled to a similar, most favorable relocation plan.

Thus, Complainant is awarded the amount of $30,198.00 in relocation expenses as such amount is fair, reasonable and appropriate.

With reference to his medical expenses, Complainant requests that I draw these reasonable inferences:

1. Mr. Creekmore has incurred $9,321.08 in medical expenses related to his stress, hypertension and heart disease. (CX 81, CX-82, CX-70; Tr. 1427, 1434-1436, 1442)

2. Mr. Creekmore has incurred and will continue to incur $75.00 per month for drug therapy related to his stress, hypertension and heart disease, a future cost to age 65 of $9,000.00. (Tr. 1487, 1492)

I have already ruled that Complainant's cardiac condition was causally related to the stress and hypertension he suffers and that such condition arises out of this termination. (CX 70; CX 82; Tr. 1479-1485; **Recommended Decision and Order**, September 1, 1994 at 37; **Decision and Remand Order**, February 14, 1996 at 24-25).

Complainant again requests that the unreimbursed medical expenses related to his stress, hypertension and heart disease should be paid by Respondents, whether awarded as additional compensatory damages or otherwise because but for the Respondents' illegal conduct, these expenses would **not** have been incurred and as they are the end product of Respondents' conduct, they should be paid by Respondents. The totality of the facts establish that the Court's award of compensatory damages should be significantly increased to compensate Creekmore for the emotional and physical harm he has suffered, according to Complainant.

With reference to his lost vacation, Complainant submits as follows:

1. When with PSESI, Mr. Creekmore received four weeks vacation per year and only receives two (2) weeks vacation at The Atlantic Group. (Tr. 1443-47)

2. Mr. Creekmore could and did accrue vacation time at PSESI and

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did not lose said vacation time if it was not taken. (CX 30; Tr. 1447-48)

3. Mr. Creekmore prepared an Exhibit, CX 83, to show the value of lost vacation to him. (CX-83; Tr. 1445-49)

4. Mr. Creekmore has lost $15,022.00 in lost vacation payments as the amounts were accruable as he could not afford to take vacation which was unpaid. (Tr. 1443-48; CX-83)

5. Mr. Creekmore will lose for lost vacation approximately ,545.00 per year until 2007 when he turns 65, or $15,450.00 present value. (Note: Neither the 4% annual increase or 4% present value decrease are applied as this calculation would be a wash.)

Complainant submits that this Court should award him future lost vacation of $15,450.00 as it fairly represents the financial value that he lost as a result of the termination impact on his vacation benefit. According to the Complainant, the Deputy Secretary of Labor's prior decision failed to recognize Mr. Creekmore's financial inability to take vacation which was unpaid and the fact the untaken vacation at PSESI accrued to Mr. Creekmore and was paid as cash thereafter.

With reference to Complainant's lost vacation, an amount he estimates at $15,022.00 for past vacation he could not take and at $15,450.00 for future vacations until 2007, at which time he attains the age of sixty-five, Respondents submit that his lost vacation ends, at the latest, in March of 1995, at which time his employment would have ended, and that such amount is $7,820.33.

As such amount is reasonable and appropriate, Complainant is awarded that amount for his lost vacation benefits.

> VI. What reimbursable costs for transportation to and from the hearings, including lodging and meals, did Creekmore incur?

Complainant posits the following:

1. Mr. Creekmore presented evidence of expenses of $4,109.26 of expenses he had incurred directly and ,189.90 of expenses Mr. Creekmore reimbursed the T.V.A. for the expenses of witness, Randy Wood's, travel, lodging and meals to testify. (Tr. 1450-53; CX 84)

2. Total reimbursable expenses claims by Mr. Creekmore are $5,299.16 . (Tr. 1450-53; CX 84)

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Complainant points out that PSESI must reimburse Creekmore for transportation, lodging and meals while attending the hearings (**Decision and Remand Order**, February 14, 1996 at 25-26), and because he has presented evidence of reimbursable costs for travel, lodging and meals to attend the hearing in the amount of $5,299.16, expenses for which he should be reimbursed.

On this issue, Complainant is absolutely correct that the Respondents must reimburse Complainant for expenses related to attending the hearing by himself and by Randy Cross, one of his witnesses. (CX 84) As I find and conclude that this amount of $5,299.16 is reasonable, necessary and appropriate, Complainant is entitled to an award of those expenses. Moreover, Complainant has utilized a most reasonable method of presenting such expenses. Whether or not such methodology would survive an I.R.S. audit is not for this forum to determine.

> VII. Whether interest shall be awarded on all sums awarded but unpaid in the decision rendered to date from the date of those decisions to the date of payment, and at what rate?

Complainant requests that I draw these reasonable conclusions:

1. Mr. Creekmore was wrongfully terminated on September 9, 1992 for having raised a nuclear safety issue. Now five years have passed and Mr. Creekmore will receive some award which, though ordered years ago, has been left unpaid. (**See Decision and Remand Orders**, February 14, 1996)

2. Interest at the I.R.S. rates on outstanding balances would total $42,111.50 as of July 1, 1997. (CX 85)

3. The I.R.S. rate for underpayment of Federal income taxes authorized by 26 U.S.C. Section 6621 are as follows for standard quarterly calculation:

A) 6/30/94 - 7% = .0176-3529 (1/4)
B) 9/30/94 - 8% = .020366804 (1/4)
C) 9/30/95 - 9% = .09 (1 yr.)
D) 12/31/95 - 8% = .02366804 (1/4)
E) 3/31/96 - 9% = .022375-77 (1/4)
F) 6/30/96 - 8% = .020087632 (1/4)
G) 9/30/96 - 9% = .022877946 (1/4)
H) 7/l/97 - 9% = .069689871 (3/4)

As already noted, interest of the back pay award at the rate specified for underpayment of Federal Income Tax in 26 U.S.C. Section 6621 has been awarded. (**Decision and Remand Order**, February 14, 1996 at 19)

However, interest does not accrue on the compensatory damages award. (**Decision and Remand Order**, February 14, 1996 at 25)

According to the Complainant, due to the delay in this matter, the awards ordered to Creekmore should be awarded interest from February 14, 1996 at the I.R.S. underpayment rate.

VIII. What attorney's fees, costs and expenses has Mr. Creekmore and his counsel incurred since the last award of attorney's fees, costs and expenses?

Complainant points out the following:

1. Attorney's fees and costs for the period up to April 23, 1996 have been awarded to date.

2. On February 12, 1997, Complainant's counsel submitted a request for fees and costs for the period April 23, 1996 to February 12, 1997. (CX 87)

3. This statement of services and costs requests $13,606.25 to be awarded as counsel fees and costs. (CX 87)

4. The Respondent has objected to certain limited services relating to services involving:

A) Connecticut Department of Public Utility Control;

B) Nuclear Regulatory Commission; and

C) Prejudgment Remedy Application.

These times are, respectively:

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A) D.P.U.C. 5/2/96      .60

B) N.R.C. 5/28/96       .30
          7/17/96       .60

C) P.J.R. 12/10/96     .30
          12/11/96     6.70 &.70
          1/6/97        .90
          1/9/97        .80
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LAW Counsel fees are authorized by statute and have previously been awarded without objection in the matter.

ARGUMENT

The legal services related to the Connecticut D.P.U.C. and the N.R.C. total 1.5 hours and thus do not logically deserve debate. Suffice it to say that the Respondents' attempt to use the preliminary N.R.C. ruling to adversely affect the outcome of this matter has been withdrawn due, in part, to the action of Complainant's counsel on his behalf. (**Decision and Remand Order**, February 14, 1996 at 7)

The proceedings before the Connecticut D.P.U.C. and the N.R.C. are so inextricably related to the proceeding before me that Attorney Heagney's services, totaling 1.5 hours, are reasonable, necessary and appropriate and, consequently, are the Respondents' obligation.

Likewise, Attorney Heagney shall be reimbursed for the legal expenses incurred in researching, drafting and filing a motion relating to the issue of pre-judgment interest. The test as to whether or not such legal services are reasonable is determined as of the date of service, and not at some time in the future. As Attorney Heagney believed that the filing of such motion is reasonable and necessary, especially given the passage of over five (5) years after the illegal termination, counsel shall be reimbursed for the legal services dealing with that issue.

I agree with counsel that he was attempting to protect the interests of Mr. Creekmore in assuring payment of any order which might be found in this matter. Though unsuccessful, no basis exists to deny the recovery of fees which, if successful, would have given greater protection to plaintiff.

Accordingly, Attorney Heagney is awarded the full award of fees as requested of $13,606.20 for the period from April 23, 1996 to February 12, 1997.

Attorney Heagney also requests that I adjust his prior attorney's fee hourly rate from $150.00 to $175.00 for 353.15 hours for the total additional amount of $8,828.75. This adjustment seems reasonable to reflect the passage of time involved in this matter, especially as I am unable to award interest on the unpaid fee award.

However, counsel has not cited, and out research has failed to identify, any precedent permitting this ALJ to make such adjustment. Thus, I am without jurisdiction to award such additional amount at this time. I do note that counsel has already been reimbursed at the hourly rate of $173.43 for his services between September 24, 1994 and April 12, 1996. (CX A)

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Complainant further requests time to file a fee petition from February 13, 1997 to date.

Thus, in summary, the Complainant requests the relief specifically discussed and set forth above as follows:

A.	Lost Wages:	$ 38,692.00 plus interest
B.	Lost Pension (PSESI)	$ 35,588.00
	Lost Pension (T.V.A. job)	$146,728 and $75,506
C.	Reimbursable Costs	$ 5,299.16
D.	Future Lost Wages (Front pay)	$ 76,540.00
E.	Unreimbursable Medical Expenses	$ 9,321.08
F.	Future Drug costs	$ 9,000.00
G.	Interest on Items Awarded	$ 42,111.50
H.	Attorney's fees (Third Appl.)	$ 13,606.20*
I.	Adjust Prior Attorney's Fee from $150.00 to $175.00 per hour 353.15 Hrs. X $25.00	$ 8,828.75
J.	Lost Vacation	$ 15,022.00
K.	Lost Future Vacation	$ 15,450.00

* Complainant requests permission to file a Supplemental Petition for work through this portion of this matter.

Finally, Complainant seeks interest on various aspects of his damages award. Interest is only appropriately accrued in this matter on any back pay awarded. Through various decisions of the Secretary, it is demonstrated that an award of interest on any other aspect of damages is inappropriate, according to Respondents.

The Secretary, in evaluating damage awards in ERA cases, has determined that interest payments are appropriate on awards of back pay; this interest in calculated in accordance with provisions of 26 U.S.C. § 6621. **See Artrip v. Ebasco Services, Inc.**, Case No. 89-ERA-23, Dec. and Ord., Sept. 27, 1996, slip op. at 6; **Blackburn v. Metric Constructor's, Inc.**, Case No ERA-4, Sec. Dec. (Dec. and Ord. on Atty.'s Fees and Damages), Oct. 30, 1991, slip op. at 11-12. Other aspects of any award to

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Complainant are not entitled to accrued interest.

First, the Secretary has conclusively determined that "the ERA does not authorize interest on costs." **Johnson v. Bechtel Construction Co.**, Case No. 95-ERA-0011, Supp. Ord., Feb. 26, 1996, slip op. at 2. Similarly, in Decision and Remand Order in this matter, the Secretary stated that "[i]nterest does not accrue on the compensatory damages award." **See** Dec. and Remand Order, slip op. at 25 (**citing Lederhaus v. Donald Paschen**, Case No. 91-ERA-13, Sec. Dec. and Remand Ord., Oct. 26, 1992, slip op. at 16, and

McCuiston v. Tennesee Valley Authority, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 24).

The Secretary has also expressed an unwillingness to award interest on attorney's fees. In **Jenkins v. U.S. Environmental Protection Agency**, Case No. 92-CAA-6, Sec. Dec. and Ord., Dec, 7, 1994, the Secretary refused to award interest on attorney's fees because the applicable whistleblower statute does not provide for such awards against a government respondent. **Id.**, slip op. at 2-3. Indeed, in the numerous cases brought against private employers pursuant to the ERA, awards of prejudgment interest on attorney's fees are not applied to private employers, although an award of interest is applied to back pay damages. **See, e.g., Nichols v. Bechtel Construction, Inc.**, Case No. 87-ERA-0044, Sec. Dec. and Ord., Nov. 18, 1993, slip op. **Blackburn v. Metric Constructor's, Inc.**, Case No. 86-ERA-4, Sec. Dec. (Dec. and Ord. on Atty.'s Fees and Damages), Oct. 30, 1991, slip op. at 16.

The Respondents are correct in asserting that interest is appropriate only on awards of back pay. The Secretary, in discussing interest on back pay, has stated:

> The fact that the ERA does not expressly provide for interest on back pay does not preclude it. Back pay awards are designed to make "whole" the employee who has suffered economics loss as the result of the employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. . . . In accordance with this policy, prejudgement interest on back pay awards has been assessed in cases arising under the ERA.

Blackburn v. Metric Constructor's Inc., 89-ERA-23, at p. 11-12 (Sec'y 10/30/91); **see also Atrip v. Ebasco Serv., Inc.**, 89-ERA-23, at p. 6 (ARB 9/27/96). Prejudgement interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621.

The Respondents further argue that the ERA does **not** authorize interest on costs, compensatory damages, or attorney fees. It is now well-settled that:

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Complainant is entitled to pre-judgement interest on his back pay award, calculated in accordance with 26 U.S.C. § 6621. Complainant is not entitled to interest on his attorney fee award, **Blackburn v. Metric Construction, Inc.**, 86-ERA-4 (Sec'y 10/30/91), at p. 12-13, **aff'd sub nom.**, **Blackburn v. Martin**, 982 F.2d 125 (4th Cir. 1992), nor does interest accrue on the compensatory damage award. **Creekmore v. ABB Power Sys. Energy Services, Inc.**, 93-ERA-24 (Dep. Sec'y 2/14/96) at p. 25 (**citing Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92), at p. 16; **McCuistion v. Tennessee Valley Auth.**, 89-ERA-6 (Sec'y 11/13/91)).

Regarding the issue of interest on costs, the Respondents correctly rely upon the Secretary's decision in **Johnson v. Bechtel Construction Co.**, 95-ERA-0011 (Sec'y 2/26/96), which expressly states, "[T]he ERA does not authorize interest on costs." **Id.** at p. 2.

CONCLUSION

In view of the foregoing, Complainant is entitled to the following awards pursuant to my mandate herein:

TYPE	AMOUNT
BACK WAGES (9/27/92 to 3/95)	$14,323.30
LOST VACATION (9/92 to 3/95	$ 7,820.33
LOST PENSION (9/27/92 to 4/94)(CX 83)	$19,354.19
RELOCATION COSTS (CX 80)	$30,198.00
HEALTH INSURANCE AND MEDICAL EXPENSES	$ZERO
ATTENDANCE AT HEARING, LODGING AND MEALS (CX 84)	$ 5,299.16
ATTORNEY'S FEE	$13,606.20

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Complainant seeks an additional amount as increased compensatory damages "to compensate Creekmore for the emotional and physical harm he has suffered."

I agree with Complainant that an additional award of such damages is reasonable, necessary and appropriate herein, especially as this matter has been pending since September 25, 1992, the date of the illegal termination. In my R.D.O. I awarded Complainant the amount of $40,000.00 as compensatory damages and that award was approved by the Deputy Secretary and the ARB. That award now constitutes the Law of the Case and the ARB's mandate to me does not include that issue. However, upon further review by the ARB and if it should be determined that the issue is still open, as the **FINAL ORDER** has not yet been issued, I find and conclude that Complainant is entitled to the additional amount of $60,000.00 "to compensate (Complainant) for the emotional and physical harm he has suffered" since September 27, 1992 because of the treatment he has received from the Respondents.

ORDER

It is therefore **ORDERED** that the Respondents joined herein shall pay to Calvin Creekmore ("Complainant") the following amounts:

1. Back Wages from September 25, 1992 through March 24, 1995 in the amount of $14,323.30. Interest shall be paid on this amount from September 27, 1992 through the date of payment thereof at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621.
2. Lost Vacation benefits in the amount of $7,820.33 for the time period September 27, 1992 through March of 1995.
3. Lost Pension benefits from September 27, 1992 to April of 1994 in the amount of $19,354.19.
4. Relocation expenses in the amount of $30,198.00.
5. Reimburseable Costs for attending the hearing, lodging and meals by Complainant and Randy Cross in the amount of $5,299.16.

Respondents shall be entitled to a mitigation offset credit of $32,978.00 representing (1) Complainant's interim earnings from National Inspection between September of 1992 and May of 1993 and (2) the severance payments received by Complainant from the Respondents.

Respondents shall also pay to Complainant's attorney, Robert W. Heagney, the fee amount of $13,606.20 representing a reasonable fee for the excellent legal services rendered on

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Complainant's behalf between April 23, 1996 and February 12, 1997. Attorney Heagney shall file, within thirty (30) days of receipt of this decision, a supplemental fee petition relating to the legal services and litigation expenses incurred after February 12, 1997. A copy thereof shall be filed with Respondents' attorneys who shall have fourteen (14) days to comment thereon.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:ln

[ENDNOTES]

[1]The then Secretary of Labor had recused himself in this proceeding.

[2]It should be noted that the Deputy Secretary found that PSESI's decision to get out of the QA/QC business and lay off staff was proper and not motivated by any animus toward Mr. Creekmore. "I disagree with the ALJ to the extent he questioned PSESI's need to reduce the QA/QC staff." p. 12, n.6. Accordingly, if the remaining QA/QC business did not warrant a full time position as was the case, Mr. Creekmore has no damages as he would have been laid off, according to Respondents.

[3]Additionally, after PSESI moved to Florida, Mr. Newholm's duties ("100%") were related to the relocation and related computer activities. (Tr. 1626-1627) By his own admission, Mr. Creekmore had virtually no computer skills and, accordingly, could not have performed Mr. Newholm's duties. (Tr. 1498)

[4]While Mr. Creekmore claimed, without any first hand knowledge, that he could have performed Mr. Taylor's duties at PSESI, Mr. Amt's testimony clearly indicated that Mr. Creekmore was not qualified to do so. (Tr. 1632-1635) (CX 10) Additionally, Mr. Taylor's job in nuclear security is not substantially similar to Mr. Creekmore's old QA/QC job.

[5]In the course of the hearing the ALJ referenced the possible application of the Administrative Review Board's decision regarding reinstatement and front pay in **Michaud v. BSP Transport**, ARB Case No. 96-198 (January 1, 1997) to the instant matter. (Tr. 1580) Since Mr. Creekmore's old position or a substantially similar position does not exist at PSESI, there is no need to apply **Michaud**.

[6]Salary adjustments are as of January 1st of each year.

[7]Regular pay to September 27, 1992, severance ($20,074.18, CX-10, of $44,450) from September 28, 1992 through December 31, 1992.

[8]Severance for January 1, 1993 through May 28, 1993 = $24,361.00 (CX-10).

[9]Sum includes $450.00 per month automobile allowance - total $5,400.00; Actual deduction for automobile = $4,171.00.

[10]$5,400.00 auto allowance - actual auto deduction of $3,653.00 ($64,963.12).

[11]10% raise exists in lost wage calculation and equaled $7,181.00.

[12]After that time, PSESI maintained a voluntary 401(k) program with no employer contribution component. Mr. Creekmore did not participate in this plan.

[13]The Complainant offered in evidence the report of Mr. Goddard, which was marked as an exhibit for Complainant. Mr. Goddard, who was on the Complainant's witness list for the hearing, was supposed to be deposed after the hearing. Complainant's counsel was to arrange Mr. Goddard's deposition with the specific provision that Respondents' counsel could cross-examine Mr. Goddard on his report. (Tr. 1602-1605, 1709). The deadline

established for depositions was August 15, 1997. Complainant's counsel, apparently, elected not to arrange for Mr. Goddard's deposition. Accordingly, CX 86 is not admitted into evidence and will not be used by this ALJ in this proceeding.

[14]This figure uses Mr. Chalfant's layoff date of March 24, 1995.

[15]Mr. Creekmore is not entitled to have his heart related medical expenses paid irrespective of whether or not he would have had them covered if he had stayed with PSESI. The Deputy Secretary did not accept this ALJ's conclusion that his heart attack was the "natural sequella" of his layoff. (p. 24)

[16]I still believe my September 19, 1994 **Recommended Decision and Order** is correct but as my mandate from the Deputy Secretary of Labor and the ARB constitutes the "Law of the Case," such mandate can be changed only the ARB or by the Court of Appeals for the Second Circuit, in whose jurisdiction this claim arises.

[17]10% raise exists in lost wage calculation and equaled $7,181.00.